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Supreme Court, U.S.
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No. 98-839

In the

Supreme Court of the United States

October Term, 1998

ADELA NAJAR VDA. DE PANTA, individually and as personal representative of the estate of Agustín Panta Pazos; EDGAR PANTA NAJAR; ROSA DEL CARMEN PANTA NAJAR; ELVIS ANDERSON PANTA NAJAR,

Petitioners,

-v-

AFRAM CARRIERS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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CORRECTION OF INCORRECT CASE CITATION

Addressing Pages 16-17 of Brief in Opposition

Petitioners acknowledge that they inadvertently provided incorrect citation to *Jones vs. Weibrecht*, 901 F. 2d 17 (10th Cir. 1990) at page 15 of their Petition. In fact, the stated proposition of law is correctly attributed to another Tenth Circuit case, styled *United States vs. St. Paul Mercury Fire Ins. Co.*, 70 F.3d 1115 (10th Cir. 1995), *cert denied* 116 S. Ct. 1568 (1996). Aside from its inconvenience to the Court and Afram, the error does not reduce the force of the argument presented: There remains an obvious conflict between the reasoning of the *St. Paul* case and the court of appeals decision in this case. Petitioners apologize for the error and counsel is at a loss to explain how it occurred.

RESPONDENT'S MISSTATEMENTS

Addressing pages 4-5 of Brief in Opposition

Respondent asserts that Petitioners have made five material misstatements to the Court. Without exception, the alleged misstatements are inaccurate or relate to allegations of disputed issues, not misstatements. Because petitioners were denied leave to intervene, no evidence or finding of fact regarding any of the underlying tort claims has been made. Therefore, it is misleading to characterize statements of factual or legal allegation regarding the underlying facts as "misstatements." This argument disposes of alleged misstatements one, two and five.

Petitioners will respond at more length to the business about alleged misstatement number three. In this, Afram claims that a statement made at page 2 of the petition is false. The actual statement on the cited page is that "Afram's lawyer, David Walker, directed the efforts to obtain the settlement from the Pantas ..." Petition at 2. This statement is fully supported by the record and, specifically, by David Walker's affidavit, which was submitted to the trial court by Afram and states as follows:

> I was employed as an attorney in representing Afram Carriers, Inc. ... in connection with ... the death of the security guard Agustín Panta Nájar [sic]. . . The survivors of Panta Nájar [sic] were contacted by Peruvian representatives of the vessel's interests to determine if it was possible to resolve their claims . . . and, as a result of these discussions, ... the claims ... were settled.

Further, the statement is supported by the affidavit of Adela Nájar Vda. de Panta, which indicated that:

> ... agents of the American ship TAMPA BAY came to me offering compensation for the death of Agustín. They made me feel that there was no other option apart from signing their documents and accepting the funds. ... They put a lot of pressure on me to accept the compensation.

The affidavit of Ms. Panta was never controverted and, in fact, was corroborated by the quoted portions of the Walker affidavit.

Furthermore, alleged misstatement five, in which Afram claims that "Throughout the petition, Agustín Panta is referred to as a seaman." is itself blatantly false: At no place in the petition is the word "seaman" or "seamen" used to describe Agustín Panta. Rather, it is used to describe accurately, certain legal issues in cases involving seamen that are presented in argument by analogy. The issue of whether Mr. Panta was or was not a seaman has not been joined and this alleged misstatement is simply flawed.

In sum, Afram's inaccurate accusations are simply efforts to distract the Court from the serious fraud injustice it has perpetrated on the petitioners in this case.

NEW MATTER RELATING TO ISSUES IN PETITION

One of the reasons cited for granting the writ is a need for clarification of the correct statement of the doctrine of judicial estoppel. That basis is predicated on respondent's inconsistent successful requests for relief in the trial court in this case. Specifically, petitioners argue that Afram should be estopped to object to intervention in the limitation proceeding voluntarily invoked by Afram. Significantly, on appeal, Afram made the following judicial admissions:

> ... Afram did not give notice to the Appellants Edgar Rahl Panta Nájar, Rosa del Carmen Panta Nájar and Elvis Anderson Panta Nájar.
>
> Panta Claimants retained the same legal rights against Afram that they had if Afram had not filed a limitation of liability cause of action. Panta Claimants retained their legal right to pursue a cause of action in an appropriate

> court in Perú, and Panta Claimants have been assured that Afram will defend the contract litigation in Perú and defend the tort litigation in Perú if a court of competent jurisdiction in Perú sets aside the Settlement Agreement and allows the Panta Claimants to sue Afram in tort for damages as a result of the death of Agustín Panta Pazos.
>
> The shipowner has no right to require claimants to file claims in the federal court unless the shipowner files the legal requirements of the Act.

Brief of Appellant at 16, 23. Obviously, Afram has induced the district court and the court of appeals to rely on its waiver of the right to limitation on at least the occasions pointed out above.

Nevertheless, petitioners inform that Court that on January 8, 1999, respondent filed AFRAM CARRIERS, INC.'S MOTION TO ENFORCE STAY ORDER, MOTION FOR SANCTIONS, AND MOTION FOR CIVIL CONTEMPT AGAINST PANTA CLAIMANTS AND THEIR ATTORNEY JUAN MEJÍA in the federal district court. In that motion, Afram now contends that the limitation act stay extends to restrain the prosecution of claims filed in Texas state court after the Pantas were unable to proceed in Perú. This contention squarely contradicts its statements on appeal and to this Court and is yet another example of the duplicity that the lower courts have mistakenly condoned.

CONCLUSION

For the reasons stated in the Petition and this Reply, the court should grant the petition for writ of certiorari, or should summarily reverse the district court and order that the Pantas immediately be granted leave to intervene prior to the August 1999 trial setting.

Respectfully submitted,

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